UTAH LABOR COMMISSION

CRECENCIANO REYES, **Petitioner,** **vs.** **CLARK'S QUALITY ROOFING; AMERICAN CASUALTY CO. OF READING, PA.; CONTINENTAL CASUALTY CO.; FREMONT INSURANCE GROUP (BANKRUPT); TRANSCONTINENTAL INSURANCE CO./CNA INSURANCE CO.; and VALLEY FORGE INSURANCE CO.,** **Respondents,**	**ORDER AFFIRMING ALJ'S DECISION** **Case No. 08-0003**

Crecenciano Reyes asks the Utah Labor Commission to review Administrative Law Judge Lima's denial of Mr. Reyes's request for appointment of a medical panel. Mr. Reyes makes this request in order to obtain medical evidence to support his claim for benefits under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63-46b-12 and § 34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

On December 31, 2007, with the assistance of his attorney, Mr. Reyes filed an Application For Hearing with the Labor Commission to obtain workers' compensation benefits from Clark's Quality Roofing and its insurance carriers. Mr. Reyes's Application alleged that his ten years of employment with Clark's caused him to suffer "hernias, knee inflammation and asthma."

Mr. Reyes provided no medical opinion or other medical evidence to support his claims of work-related knee inflammation and asthma. With respect to his claim of a work-related hernia, Mr. Reyes provided the following letter from Dr. Hollingshead (emphasis added):

> I saw Mr. Reyes in my office today . . . . My examination confirms that he does have a right inguinal hernia. He states that he noticed this in May of 2007. This continued through the summer and has been quite painful for him at work. . . . It is **conceivable** that this hernia occurred while at work, considering the type of work that he does which requires a lot of lifting. . . . If I can be of any further assistance, please contact me.

Thus, Dr. Hollingshead's letter fell short of expressing a medical probability that Mr. Reyes's work caused his hernia. And, as already noted, Mr. Reyes submitted no evidence of a causal connection between his work and his alleged knee inflammation and asthma. To address this lack of medical evidence, Mr. Reyes asked Judge Lima to appoint a medical panel to examine him and submit a report. Mr. Reyes asserted that appointment of a medical panel was appropriate under the Labor Commission's Rule R602-2-2.C, because Mr. Reyes's treating physician "has failed and refused to give an impairment rating" and because "due to [Mr. Reyes's] lack of resources, a substantial injustice may occur" unless a panel was appointed. Mr. Reyes supported his request with his affidavit stating that his physician had "refused" to fill out the Commission's "Summary of Medical Records" form and that Mr. Reyes could not afford to pay for a private physical examination.

On January 7, 2008, Judge Lima denied Mr. Reyes's request for appointment of a medical panel. Judge Lima concluded that the Commission's Rule R602-2-2 allowed appointment of medical panels **only** in cases where the parties had submitted "conflicting" medical opinions. Judge Lima reasoned that, because there were no conflicting medical opinions in this case--in fact, no medical opinions at all addressing medical causation--Rule R602-2-2 did not permit her to appoint a medical panel.

Mr. Reyes now requests Commission review of Judge Lima's decision. Mr. Reyes argues that Rule R602-2-2 does not require conflicting medical opinions in every case as a prerequisite to appointment of a medical panel. Specifically, Mr. Reyes points out that Rule R602-2-2.C authorizes appointment of a medical panel if: 1) a treating physician has "failed or refused" to provide and impairment rating; or 2) a "substantial injustice" may occur unless a panel is appointed.

DISCUSSION

Section 34A-2-601 of the Utah Workers' Compensation Act grants the Commission's ALJs discretion to appoint medical panels in disputed workers' compensation and occupational disease cases. The Commission's Rule R602-2-2 describes the circumstances in which ALJs should exercise their discretion to appoint medical panels. Rule R602-2-2.A calls for appointment of a medical panel when the parties have submitted conflicting medical reports regarding a significant medical issue. As already noted above, there are no "conflicting medical reports" in this case. Consequently, Judge Lima correctly concluded that Rule R602-2-2.A does not authorize appointment of a medical panel.

However, Rule R602-2-2.C provides an alternative basis for appointment of a medical panel. Subparagraph C provides as follows:

> The Administrative Law Judge may authorize an injured worker to be examined by another physician for the purpose of obtaining a further medical examination or evaluation pertaining to the medical issues involved, and to obtain a report

addressing these medical issues in all cases where:
1. The treating physician has failed or refused to give an impairment rating, and/or
2. A substantial injustice may occur without such further evaluation.

The Commission views subparagraphs A and C of Rule R602-2-2 as applying to different situations. Subparagraph A applies to cases in which both parties have submitted medical opinions but those opinions conflict with each other. Subparagraph C addresses two more unusual situations—cases where a treating physician "fails or refuses" provide an impairment rating and cases in which a "substantial injustice" may occur unless a physician is appointed to examine and report on an injured worker's medical issues.

In this case, it does not appear that Mr. Reyes's medical problems have reached stability so that a physician could properly assign an impairment rating. Consequently, it would be inappropriate to appoint a physician under subparagraph C.1 for that purpose. The Commission therefore turns to consideration of subparagraph C.2's "substantial injustice" standard as a basis for appointing a physician.

Subparagraph C.2 is a rarely invoked provision that allows the Commission to obtain medical information in cases where no such information is otherwise available. This provision should be used only in exceptional cases. Otherwise the burden it would impost on the Commission's medical panel system could prevent the Commission from having panels available for other cases where the panel's services are more appropriate. The issue now before the Commission is whether Mr. Reyes has shown that his circumstances are so exceptional that the Commission should provide him with a medical examination to evaluate the connection between his work and his alleged injuries.

In support of his request for medical examination, Mr. Reyes has submitted a short affidavit that, for the most part, contains only conclusionary statements regarding his medical and financial conditions. Although Mr. Reyes's affidavit asserts that he cannot obtain medical information to support his claim, the Commission notes that Mr. Reyes has been examined by Dr. Hollingshead, and that Dr. Hollingshead's letter of November 29,2 007, concludes with an invitation to contact him if further assistance is required. The Commission therefore concludes that Mr. Reyes's has not shown the type of exceptional circumstances necessary under Rule 606-2-2.C.2 for appointment of a medical panel.

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ORDER

The Commission affirms Judge Lima's order. It is so ordered.

Dated this 31st day of March, 2008.

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Sherrie Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Industrial Commission to reconsider this Order. Any such request for reconsideration must be received by the Industrial Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.